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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

GARY HANEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

BOBBY MCDANIEL
MCDANIEL & WELLS, P.A.
400 South Main Street
Jonesboro, Arkansas 72401
(501) 932-5950
Counsel for Petitioner

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QUESTIONS PRESENTED

I

WHETHER THE CONDUCT OF THE TRIAL COURT TOWARD COUNSEL FOR A CRIMINAL DEFENDANT, SUCH AS ORDERING COUNSEL TO REGISTER NO MORE OBJECTIONS (WHILE THE TRIAL WAS STILL IN PROGRESS), OPENLY CHASTISING COUNSEL IN THE PRESENCE OF THE JURY AND MAKING COMMENTS THAT CAST THE GOVERNMENT AS THE UNDERDOG, IS SUCH A MANIFEST ABUSE OF DISCRETION THAT IT DEPRIVES A DEFENDANT OF DUE PROCESS OF LAW AND OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

II

WHETHER THE DEFENDANT IS DENIED A FAIR TRIAL WHEN THE TRIAL COURT REFUSED TO ALLOW A CRIMINAL DEFENDANT TO DISCUSS IN HIS OPENING STATEMENT EXCULPATORY TESTIMONY FROM A COURT AUTHORIZED DEPOSITION OF A CO-CONSPIRATOR WHO INVOKED HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AS TO HIS OWN ACTS, WHILE THE COURT ALLOWED THE GOVERNMENT TO DISCUSS WHAT WERE ASSERTED TO BE INCULPATORY CO-CONSPIRATOR STATEMENTS FROM THE SAME WITNESS MADE DURING THE COURSE OF THE INVESTIGATION, BECAUSE THE GOVERNMENT CLAIMED IT WAS DENIED IT'S RIGHT TO CROSS-EXAMINE THE WITNESS ON ISSUES OF CREDIBILITY.

III

WHETHER THIS COURT SHOULD TAKE THIS CASE TO RESOLVE THE SPLIT IN THE FEDERAL CIRCUIT COURTS OF APPEAL AS TO WHETHER A DEFENDANT THAT TAKES THE WITNESS

STAND IN HIS OWN DEFENSE AND ABSOLUTELY DENIES ANY PARTICIPATION IN THE CHARGED CRIME CAN BE CONFRONTED BY THE GOVERNMENT IN REBUTTAL WITH PROOF OF OTHER UNRELATED BAD ACTS AND ASSOCIATIONS OF A CO-CONSPIRATOR FOR THE PURPOSE OF SHOWING KNOWLEDGE OR INTENT TO COMMIT THE CRIME CHARGED.

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PETITION FOR A WRIT OF CERTIORARI

Gary Haney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra,* 1a-14a) has not been reported at this time but is believed to be designed for publication. The order denying Gary Haney's petition for rehearing (App., *infra,* 15a) is not reported. There was no written opinion from the trial court.

JURISDICTION

The Eighth Circuit Court of Appeals filed it's opinion (App., *infra*, 1a-14a) on November 29, 1993. Gary Haney filed a timely petition for rehearing with the Eighth Circuit which was denied (App., *infra*, 15a) on January 6, 1994. On April 2, 1994, Justice Blackmun signed an order extending the time for filing this petition for certiorari up to and including June 3, 1994. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

This was a criminal action, tried before a jury, brought by the United States Government against Gary Haney wherein the government alleged Gary Haney conspired with five other individuals to distribute cocaine and marijuana in violation of 21 U.S.C. 846. Defendant Gary Haney vigorously denied he was a part of any conspiracy and put forth a defense that he had been drawn into Defendant Jerry Massey's smuggling operation under the belief he was purchasing Mexican leather goods from Massey for a flea market business with his brother Larry Haney. The named defendants were Ambrosio Perez-Murguia a/k/a "Hueto" (hereinafter Perez), Jerry L.

Massey (hereinafter Massey), Salvador Lopez (hereinafter Lopez), Leon Frayer (hereinafter Frayer), Larry Haney and Gary Haney. Lopez has never been located. Massey was incarcerated in a Mexican prison, voluntarily signed extradition papers to return to Arkansas, but he was not present at the trial. This case proceeded to trial against the remaining four defendants, Perez, Frayer, Larry Haney and Gary Haney.

The jury trial began June 8, 1992, and concluded June 22, 1992. Frayer was found guilty of conspiracy to distribute marijuana and carrying a firearm during a drug transaction. Larry Haney was found guilty of conspiracy to distribute marijuana but his conviction was reversed and dismissed by the Eighth Circuit. Both Larry Haney and Leon Frayer were acquitted of the cocaine count. Gary Haney was found guilty of conspiracy to distribute cocaine and marijuana. Gary Haney filed a timely motion for judgment of acquittal. This motion was denied by order filed September 8, 1992, and a judgment and commitment order was entered September 9, 1992. A timely notice of appeal was filed September 16, 1992. The Eighth Circuit affirmed Gary Haney's conviction by opinion filed November 29, 1993.

Factual Background

Gary Haney lived in Pocahontas, Arkansas and worked at various jobs including working with his brother, Larry Haney, in the flea market business. Jerry Massey was a former resident of Pocahontas, but had not lived in the Pocahontas area in approximately 15 years. Although Gary Haney had been acquainted with Massey when he lived in Pocahontas, but had not talked to him since Massey moved away.

In the fall of 1990, Massey began contacting other residents of Pocahontas asking if they were interested in investing in leather goods imported from Mexico. (T. 1294) Massey was given the names of Gary Haney and

Larry Haney and told they might be interested. (T. 1294)

In November of 1990, Massey contacted Gary Haney and told Gary Haney about the profitability of importing leather goods from Mexico. (T. 1430-1431) Gary Haney even checked with a person that had extensive experience in the import/export business to obtain additional information about this business. (T. 1289-1292, 1432)

Massey was a quick talking salesman that convinced Gary Haney this was a good business venture. (T. 1432) Gary Haney ultimately sent approximately $6,800 to Massey to purchase the leather goods. Unknown to Gary Haney at that time, Massey was a con man incarcerated in a Mexican prison. (T. 632, 1339, 1435) Massey was desperately seeking money from other sources either to pay for favors in the Mexican prison or, in cooperation with other people, to finance a drug operation. (T. 635, T. 644) Massey's plan was to dupe unsuspecting people into sending him money and picking up "papers" for him that was actually drug money. Massey even used a relative, Doug Cousins, that was a police officer in Pocahontas, to pick up "papers".

U.S. Customs Special Agent John Turner (hereinafter "Agent Turner"), acting undercover, became aware of Massey's activities and began a dialogue with Massey on or about March 19, 1991, in an effort to complete a drug deal. Massey explained to Agent Turner his method of operation—he would get acquainted with an individual within the United States that did not know about his drug operation and have them to do an innocuous favor for him such as picking up a "package". (T. 641-643) The "package" was the cash payment for the drugs. Massey told Agent Turner that no one in Pocahontas knew what he was doing. (T. 643-644)

Massey told Agent Turner that when they complete their deal to put the money in a brown envelope because

he did not want the person that picked up the envelope to know what was in it. (T. 646) That person turned out to be Gary Haney. The first time Gary Haney's name was mentioned to Agent Turner was shortly before the drug deal on July 2, 1991.

Shortly before the July 2, 1991, meeting, Masesy informed Gary that he had some paperwork in Little Rock and wanted Gary Haney to pick up the documents. Gary learned his brother, Larry Haney, was going to be in Little Rock on unrelated business and asked him to pick up the papers. On July 2, 1991, Larry arrived at the designated location but only knew he was there to pick up a car title or some miscellaneous documents. Agent Turner approached Larry Haney and immediately started talking about a drug deal. Larry Haney's response was "I don't know what you are talking about." (T. 670, 1552) In fact, Larry Haney repeatedly told him he was just there to pick up documents and mentioned a car title. (T. 675, 679, 1553) Agent Turner contacted his supervisor and was notified the deal was off. Larry Haney did not receive a "package".

Larry Haney told Gary Haney what had occurred, specifically that Agent Turner said Massey was involved in dealing drugs. Gary Haney contacted Massey to discuss this with him. Massey assured him he was not involved in dealing drugs. (T. 1439)

Gary Haney continued to have contact with Massey to get an update on the leather goods business. Finally, Massey admitted that the leather goods deal would not go through. At that point, Massey owed Gary Haney $6,800.00 and Gary Haney demanded his money back. (T. 1444) An agreement was reached that Gary would be paid $8,000.00 representing the amount originally invested ($6,800.00) and the numerous collect telephone calls. (T. 1343, 1445)

Prior to the December 5, 1991, meeting, Gary Haney had never met Agent Turner and had never met or

talked with Leon Frayer. (T. 1443-1444) In the early part of December, 1991, Massey told Gary that a good friend, John (a/k/a Agent Turner), had just left Mexico, that he would be through Little Rock in a few days and he could pick up the money Massey owed him. Massey asked him as a favor to pick up his ice chest from John and return it to his family in Pocahontas.

Massey had another drug deal working with Agent Turner. Massey directed Agent Turner to put $8,000.00 in a brown envelope to give Gary and to put the rest of the money in the false bottom of the ice chest. T. 723-724) Gary Haney traveled to Little Rock to meet "John" to pick up his money. Gary Haney was arrested shortly after he arrived at the designated meeting point.

Deposition Testimony of Massey

When it became obvious the government was not going to extradite Jerry Massey in time for the trial, Gary Haney requested permission of the Court to obtain the telephone deposition of Jerry Massey. Massey was still incarcerated In Mexico but had limited access to a telephone. The brief direct examination of Massey was conducted by counsel for Gary Haney and was completely exculpatory to Gary Haney. Massey admitted he had duped Gary Haney under the guise of importing leather goods and that Gary Haney was not aware of, nor involved in, any drug deals. The government began a long and extensive cross-examination of Massey regarding his involvement. Massey asserted the Fifth Amendment and stated he would do so to any questions regarding his own involvement. The telephone link was terminated numerous times because of the length of the telephone call.

Trial

At trial the government objected to Gary Haney's use of the deposition asserting it was denied a full cross-examination. The trial court granted the motion and in-

structed counsel for Gary Haney to not mention the exculpatory testimony in opening statement. The government however, was allowed in opening to discuss the alleged inculpatory statements by Massey about Gary Haney. Defendant was ultimately allowed to mention the testimony after the government completed its case, and withdrew it's objection to the deposition. During the trial, the trial court ordered Counsel for Gary Haney to register no more objections. Further, after Gary and Larry Haney had rested, the government offered rebuttal testimony that Larry Haney had used marijuana and on one occasion had sold a small amount of marijuana.

On appeal to the Eighth Circuit, Gary Haney asserted the refusal to allow the exculpatory testimony to be discussed in opening statement was error. The Eighth Circuit found it was not error stating there was no prejudice because Gary Haney was eventually allowed to present the testimony. (App., *infra*, 11a) On appeal Gary Haney also asserted the comments of the trial court to counsel for Gary Haney, such as directing him to register no further objections and chastising him before the jury, denied him a fair trial and effective assistance of counsel. The Eighth Circuit found this was not error and was within the sound discretion of the court. (App., *infra*, 11a-14a) Further, Gary Haney asserted the court committed error by allowing improper rebuttal evidence of prior bad acts of a co-defendant. The Eighth Circuit noted this issue had been raised but did not address this issue. (App., *infra*, 11a)

REASONS FOR GRANTING THE PETITION

This petition presents three important criminal law and evidence questions for review. A clear declaration by this court on these three issues will provide guidance to all state and federal courts, and could prevent a miscarriage of justice in the numerous cases that will never have the opportunity to make their way to this court for relief.

The first question relates to the admission of other bad acts following a defendant's denial of involvement in the alleged criminal activity. There is a strong division in the circuits on this issue. The second question relates to the interplay between a defendant's right to present exculpatory evidence from a witness that invokes his Fifth Amendment right against self-incrimination and the government's right to cross-examine the witness. Finally, the petition raises the question of whether the trial court's conduct toward defendant's counsel, such as ordering counsel to not object and chastising counsel before the jury, deprives a defendant of a fair trial and the effective representation of counsel. The lower court decision upholding the conviction of petitioner is erroneous.

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE ADMISSIBILITY OF REBUTTAL EVIDENCE OF PRIOR CRIMES TO ESTABLISH INTENT OR KNOWLEDGE UNDER RULE 404(b) WHEN A DEFENDANT RESTS HIS DEFENSE ON AN ABSOLUTE DENIAL OF PARTICIPATION IN THE CHARGED CRIME.

The need for a decision by this court on the proper application of Fed. R. Evid. 404(b) is demonstrated by the split in the circuits regarding the admissibility of rebuttal evidence of prior crimes to establish intent or knowledge when a defendant rests his defense on an absolute denial of participation in the charged crime. There is no issue of intent where the defendant denies he committed the charged act. Gary Haney has found no reported decisions of this Court that directly addresses the issue presented.

In *United States v. Jenkins*, 7 F.3d 803 (8th Cir. 1993), the Eighth Circuit Court of Appeals held that proof of prior drug transactions is inadmissible as rebuttal evidence following a Defendant's denial of any involvement in the charged act. Jenkins was charged with selling LSD on two occasions. Jenkins denied the charged

acts. On rebuttal, the government was allowed to offer the testimony that Jenkins had sold drugs on other occasions. In reversing the lower court, the Eighth Circuit stated:

> Because Jenkins testified unequivocally that he did not commit the acts charged against him, the rebuttal testimony clearly brought Defendant's prior bad character to the forefront to infer that having sold drugs on three prior occasions, he undoubtedly sold drugs on the two occasions charged in the indictment.

The Eighth Circuit embraced the well-established rule of the Second Circuit Court of Appeals that there is no issue of intent where the defendant denies he committed the charged act. *United States v. Oritz*, 857 F.2d 900 (2d Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989); *See also, United States v. Colon*, 880 F.2d 650 (2d Cir. 1989). This rule has also been followed in the Ninth Circuit, *United States v. Palmer*, 990 F.2d 490 (9th Cir. 1993) and the Fifth Circuit, *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978).

Other Circuits have taken a contrary or modified view finding that the evidence was admissible in full or in some limited capacity. See *United States v. Mazzanti*, 888 F.2d 1165 (7th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990); *United States v. Hernandez*, 975 F.2d 1035, 1040 (4th Cir. 1992); *United States v. Russo*, 717 F.2d 545 (11th Cir. 1983).

The present case would provide an appropriate forum for the Court to draw a bright line regarding the proper scope of rebuttal evidence following a Defendant's denial of participation in the charged criminal activity. Petitioner, Gary Haney and co-defendant Larry Haney, took the stand in their own defense. Both denied they had been participants in a conspiracy to distribute controlled substances as alleged by the government. After both defendants rested their case, the Government, in rebuttal, offered the testimony of a third party that he had smoked

marijuana with Larry Haney on three or four occasions and that on one occasion before March of 1991, Larry Haney had sold one-fourth ounce of the marijuana to Bradford Powell. (T. 1766-1768, 1779-1780) A timely objection was raised and denied. (T. 1754-1762, 1779). This issue was addressed in point III of Gary Haney's opening brief and can be found at page 46. The Eighth Circuit did not specifically rule on this issue other than to note that Gary Haney raised the rebuttal evidence issue (App., *infra* 7a).

The trial court allowed this evidence of prior bad acts to establish knowledge pursuant to Fed. R. Evid. 404(b). The ruling is incorrect because intent is not placed in issue by a defense that the defendant did not commit the charged act. *United States v. Oritz*, 857 F.2d 900 (2d Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989); *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978). The ruling of the lower court, if allowed to stand, will have the effect of subjecting numerous criminal defendant to improper rebuttal testimony when the defendant takes the stand in his own defense and denies the charged crime. This issue needs the guiding hand of this court to squarely address the question presented.

II. THE QUESTION PRESENTED REGARDING REBUTTAL EVIDENCE IS IMPORTANT AND HAS APPLICATION TO VIRTUALLY ALL STATE COURTS.

Our system of justice is hinged on the concept that a criminal defendant should go free unless the government can prove his guilt beyond a reasonable doubt. It goes without saying this determination of guilt should be based on evidence of the alleged crime not on whether the defendant has committed other "wrong" acts in the past. In the present case, once the defendant denied involvement in the alleged act, the government was then entitled to dredge up prior bad acts as "rebuttal" evidence, under the guise of establishing "knowledge" or "intent" for the

jury to consider as evidence that the defendant must have committed the charged crime. Such evidence does nothing more than tell the jury that the defendant is a bad person, or associates with bad people, and should be punished regardless of whether he committed the charged crime. If a rule or decision allows the introduction of improper and prejudicial evidence to be considered by the jury in it's deliberation, the defendant is deprived of due process of law.

The question presented effects more than one defendant from a small town in Arkansas. This question effects defendants across the United States, in state and federal court, that chose to take the stand in their own defense and deny they commited the alleged crime. The relevant portion of Fed. R. Evid. 404(b) is model language that is found in virtually every state's rules of evidence. For this reason, a decision by this court regarding the proper application of this rule will provide direction to the state courts, as well as federal courts, on this important evidentiary and constitutional issue.

III. THE CONDUCT OF THE TRIAL COURT TOWARD COUNSEL FOR THE DEFENDANT WAS A MANIFEST ABUSE OF DISCRETION AND PROVIDES THIS COURT WITH THE OPPORTUNITY TO STATE WHAT CONDUCT BY A JUDGE IS IMPERMISSIBLE AND DENIES A DEFENDANT OF A FAIR TRIAL AND EFFECTIVE REPRESENTATION OF COUNSEL.

During the course of this trial, and in the presence of the jury, the trial court's demeanor toward and numerous remarks to trial counsel for Gary Haney, destroyed his credibility in the eyes of the jury and denied Gary Haney a fair trial and the effective representation of counsel. The trial court ordered Gary Haney's attorney to not register *any* other objections during the trial, openly chastised counsel before the jury and clearly sided with the government through the criminal trial.

In *United States v. Bland*, 697 F.2d 262, 265 (8th Cir. 1983) the Eighth Circuit stated:

> We think the balance is adversely tipped against the defendant in a criminal trial where the judge's role loses its color of neutrality and tends to accentuate and emphasize the prosecution's case. . . A judge's slightest indication that he favors the government's case can have an immeasurable effect upon a jury.

During the government's cross-examination of a co-defendant, Larry Haney, counsel for Gary Haney interposed an objection. The trial court ordered defense counsel for Gary Haney to register no more objections at trial since he had rested his case even though other defendant's still were calling witnesses. (T. 1610-1611) Not unexpectedly, no case exactly on point has been found where a judge prohibited counsel from objecting.

The following colloquy between the trial court and counsel, which occurred in the presence of the jury, clearly demonstrates that Gary Haney was deprived of the effective assistance of counsel (T. 1610-1611):

> THE COURT: Let's not double team on the government here now. You might consult with Mr. Clark, but we're not going to have two defense counsel registering objections. You may go over there and consult with Mr. Clark, but we're not going to have you objecting simultaneously along with Mr. Clark.
>
> MR. McDANIEL: If it please the court, and I respectfully state to the court, in my representation of Gary Haney, who is tried jointly with Larry Haney—
>
> THE COURT: Yes.
>
> MR. McDANIEL: —and the evidence with Larry Haney is being presented to this same jury, I respectfully submit it's my duty if I think the government is doing something inappropriate with any wit-

ness, Larry Haney, Leon Frayer or anybody else. I respectfully submit to the Court—

THE COURT: You have rested.

MR. McDANIEL: But that doesn't mean I don't have a right to object, your honor.

THE COURT: *I'm directing you whenever you have an objection to consult with Mr. Clark. Understood?*

MR. McDANIEL: I'll obey the Court's order and may I object to the procedure?

THE COURT: Yes. *The Court will not entertain any further objections from you, Mr. McDaniel.* You consult with Mr. Clark. (emphasis added)

Timely objections are required of effective counsel. The objection counsel made on behalf of his client, Gary Haney, was a necessary and proper objection. The Court's remarks had the effect of belittling counsel for Gary Haney in the eyes of the jury, as well as substantively and erroneously restricting the rights of Gary Haney by denying effective representation.

Gary Haney was a separate defendant, accused of engaging in a conspiracy with the other defendants, and the government was attempting to use the statements of all other defendants against Gary Haney. If the testimony of the other defendants can be used against a defendant, certainly that defendant has an equal right to object to an improper examination, even if his evidence had concluded. Therefore, Gary Haney had an absolute right to object to an improper question posed to any defendant. To order counsel not to object at all is a *per se* denial of a fair trial.

The Eighth Circuit found that counsel had not pointed to prejudice. However, since the trial court ordered counsel not to object, a simultaneous objection could not be expected to be lodged during the trial. Further, counsel offered to testify at a post-trial hearing regarding the prej-

udice. Although the trial court refused to allow counsel to testify for the record the impact of the court's intemperate manner and ruling, the record *does* reflect it in a hearing outside the presence of the jury.

> MR. McDANIEL: I might point out further, your honor, that I would, with due repect to the Court, the dressing down of defense counsel in the presence of the jury and the stating as a matter of law that I'm not entitled to object on behalf of my client while at the same time on numerous occasions telling Mr. DeJesus to not apologize for objecting that it's a duty of counsel, but then when I do it, I am humiliated in front of the jury. I am cautioned, admonished, and I thought I was at the point of almost being held in contempt. I have to respect your honor, and I do, but I must also respectfully disagree . . . (T. 1629-30)
>
> . . .
>
> MR. McDANIEL: Your honor, may I then respectfully state for the record that I respect your honor's decision even though I disagree with it, and I feel unduly restrained in the representation of my client. I feel like his constitutional right to competent representation is impaired . . . (T. 1632)

What more has to be done, or can be done, when the trial judge will not allow a record to be made? In the proceeding to try to make a record, the following occurred:

> . . . I maintain that only I can state what chilling effect that it had on me, and I will say that I've never in 20 years of law practice been ordered not to object in the course of a trial when I am representing an individual. I may be wrong in my objection, I may be right in my objection, but I've never been told that I didn't have the right to object, and I was devastated by that. It affected me mentally and emotionally throughout the remainder of the trial, . . . (T. 2128).
>
> . . .

> . . . yes, that had a chilling effect on me and, in my opinion, the fairness of the trial to this defendant (T. 2129).

What is the prejudice? Every experienced trial lawyer knows that when the judge displays anger, hostility or dissatisfaction toward defense counsel or suggests defense counsel is acting inappropriately, counsel is less credible with a jury. All trial lawyers know jury credibility is crucial in a jury trial. All trial lawyers also know that to incur the wrath of the trial judge is to jeopardize your chances of prevailing with the jury. A defendant is entitled to a fair and impartial trial and Gary Haney did not get that.

When the court takes any action that implies favoritism toward the government, that alone, without more, is reversible, prejudicial error. See, *United States v. Spears*, 558 F.2d 1296 (7th Cir. 1977), *United States v. Blakely*, 602 F.2d 779 (7th Cir. 1979). In *United States v. Porter*, 441 F.2d 1204 (8th Cir. 1971), the Eighth Court stated:

> Although on rare ocasions, discipline of counsel or parties may require unusual action by the Court, there should always remain above all else the neutrality of the trial court manifesting to the jury no inkling of one sidedness or bias. When comments of the trial court exceed the boundaries of fair discipline by official disparagement of counsel or of a litigants case, then error must follow.

The trial court's statement, "let's not double team the government" gave the appearance that Gary Haney's counsel was taking advantage of the underdog government and chastising defense counsel in front of the jury. It also demonstrated, in the eyes of the jury, the judge was siding with or protecting the government. Comments by the Court which cast the prosecutor as the "underdog" in the eyes of the jury is impermissible. *See, United States v. Singer*, 710 F.2d 431, 436 (8th Cir. 1983).

To further demonstrate the obvious unfairness toward Gary Haney, the Court on at least two occasions told the jury after objections were registered by Mr. DeJesus, counsel for Perez, that objections were proper, that he had a right to object, that he was zealously representing his client and the jury should not hold that against him even though the Court overruled the sometimes lengthy objections. (T. 454, 455, 519) However, the Court chastised counsel for defendant Gary Haney in the presence of the jury and this had the effect of minimizing and frustrating independent and effective counsel and diminishing the significance of the representation of Defendant Gary Haney. The court's actions lost its color of neutrality and the balance was adversely tipped against Gary Haney.

Gary Haney asserts another example of an abuse of discretion directed toward his counsel that denied him effective representation was demonstrated by the Court's undue and uneven interference in the cross-examination of the government's key witness, Agent Turner. Agent Turner was called by the government in it's case-in-chief and had testified on direct examination for approximately two and one-half days, consuming 310 pages of the trial transcript. (T. 261-571) The government introduced, and played for the jury, approximately thirty (30) tape recorded conversations. On cross-examination counsel for Gary Haney moved to introduce *one* of the tape recorded conversations between Turner and Massey that occurred on July 1, 1991, that had not been played by the government. The government specifically stated it had no objection to this request. (T. 656) Previously, without objection from the government or the Court, counsel for Defendant Perez played eight tapes that were not played in the government's case in chief and even *replayed* one tape the government had already played. Counsel for Mr. Haney attempted to play one tape. However, when counsel for Gary Haney proceeded in a similar fashion to what had previously been done by counsel for Perez,

without objection from the government or the Court, the Court, *sua sponte*, objected to the tape being played and engaged in colloquy questioning Gary Haney attorney's method of impeachment. This cast Haney's counsel in the light of impropriety in front of the jury and singled him out as inappropriate and treating him harshly and differently than other counsel.

The rebuke of counsel continued later in a hearing outside the presence of the jury. (T. 666-668) The Court stated, "The Court has something to discuss with defense counsel" (T. 666) and accused defense counsel of attempting to prolong the trial. Gary Haney's cross-examination begins on page 621 of the transcript and ended on page 753 consisting of a total of 132 pages while the government's direct examination of Agent Turner lasted a total of 310 pages, beginning on page 261 and ending on page 571, not counting the extensive time required for the playing of the thirty or so tapes which were not made part of the reporter's transcript (except exhibits were made of typed transcripts of the tapes). The government never objected to this cross-examination as being repetitious, beyond the scope of direct or otherwise inappropriate. Unfortunately, these acts, when viewed together, demonstrate the court lost its color of neutrality, and although directed at counsel, punished Gary Haney by denying him a fair trial.

IV. DEFENDANT WAS DENIED A FAIR TRIAL WHEN HE WAS NOT ALLOWED TO DISCUSS IMPORTANT EXCULPATORY EVIDENCE DURING OPENING STATEMENT.

During opening statement to the jury, Gary Haney was not allowed to tell the jury that Jerry Massey, the alleged drug kingpin, had testified in a deposition, that Gary Haney was not dealing drugs but rather had been duped by him under the guise of purchasing leather goods from Mexico. The testimony of Jerry Massey was exculpatory and was critical to Gary Haney's over-all defense. (T.

1331-1344) Moreover, it was critical that the jury know of the existence of the exculpatory testimony before it heard seven (7) days of the government's case and in excess of forty (40) tape recorded conversations of Massey so that they could be alerted to listen to the tape recordings for statements on the tapes that were consistent with Gary Haney's defense and inconsistent with the government's theory of the case.

The opening statement should objectively outline the evidence reasonably expected to be introduced during the trial. *United States v. Kalagian*, 957 F.2d 527 (8th Cir. 1992); *United States v. Johnson*, 767 F.2d 1259 (8th Cir. 1985). The purpose of opening statement is "to give the jury the broad outline of the case to enable the jury to comprehend it." *United States v. DePeri*, 778 F.2d 963, 978 (3rd Cir. 1985), quoting *Government of the Virgin Islands v. Turner*, 409 F.2d 102, 103 (3rd Cir. 1969). However, Defendant Gary Haney was ordered not to discuss this exculpatory testimony in opening statement, thus depriving him of an effective opening statement to give the jury the opportunity to listen for and to place the exculpatory testimony in perspective while listening to the evidence and tape recordings. The government however, was allowed to discuss Massey's alleged inculpatory statements. The jury was only allowed to preview the government's side of the case. The prejudice to Gary Haney was irreversible and played a substantial role in his conviction. This argument was presented to the trial court before opening statement when it could have been corrected but was rejected by the trial court. (T. 108-155)

Only after the jury had heard the government's entire case lasting 7 days which included over 40 tape recorded conversations mostly between Massey and Agent Turner did the jury get to hear anything about the exculpatory deposition of Massey. Opening statements were on June 10, 1992, and the deposition was finally read to the jury on June 18, 1992. (T. 1331-1417) Merely allowing this

testimony to come into evidence after the government's case, without the jury being told at the *beginning* of the case of this significant exculpatory evidence, and thus being able to place it in perspective with the other testimony offered as it was being originally presented, unduly prejudiced defendant Gary Haney and denied him a fair trial.

The analysis of this point is a two-fold process. (A) Was the deposition of Massey admissible? (B) If so, was Gary Haney prejudiced by his inability to discuss this crucial piece of exculpatory evidence in his opening statement and denied him a fair trial. *See, Kalagian, supra. United States v. Brokington*, 849 F.2d 872 (8th Cir. 1988).

A. Admissibility of Massey Deposition.

Massey, although a named defendant, was not present at trial. At the time of trial Massey was incarcerated in a jail in Saltillo, Mexico. Gary Haney repeatedly requested that Massey be present for trial. The government asserted it was making efforts to bring Massey back for trial but actually had not completed extradition. Massey testified that he had signed a document agreeing to be extradited in March, 1992. (3 months before the trial) and was willing to return to Arkansas for the trial. (T. 1332-1333) Despite Massey's cooperation and Gary Haney's request, Massey was not present at trial. Gary Haney's motion to take the deposition of Massey by telephone was granted.

Massey's direct testimony can be summarized in one short phrase "Gary Haney did not know he was involved in a drug transaction." (T. 1340-1344) Massey's direct testimony was solely limited to offering exculpatory testimony for Gary Haney and he did not discuss his own involvement in a drug transaction. Further, the government was informed by Massey that he would invoke his Fifth Amendment rights on any question pertaining to

his own involvement. The government was free to cross examine Massey about this exculpatory testimony, but instead chose to examine Massey about his own involvement in drug transactions. Massey, of course, invoked his Fifth Amendment right and refused to answer any questions concerning his direct involvement. He stated repeatedly that he would answer any questions about *Gary* but not questions about *his* own involvement.

The government's lengthy cross-examination was far beyond the scope of the direct examination and continued to cover areas where Massey had invoked his Fifth Amendment rights. The telephone deposition was interrupted three times, either because Massey was directed to get off the telephone or because the connection was lost. The interruptions occurred long after the government had been warned that Massey's time was limited and was encouraged to ask whatever questions they had concering the matters covered in direct. The government refused to do so.

The government asserts it was denied a full and fair cross-examination. Gary Haney asserts the government had the opportunity to cross-examine Mr. Massey concerning the exculpatory testimony that was offered on direct. Any limitation on the government cross-examination was on questions that went merely to Mr. Massey's own criminal involvement and, thus, his credibility. This minimal limitation on the government's cross-examination does not begin to outweigh defendant's right to offer exculpatory testimony and compulsory process, especially when the government's case against Gary Haney was weak and totally circumstantial. The need to offer another explanation and corroboration for Gary Haney's actions was paramount and withholding this evidence had the effect of significantly increasing the likelihood of a conviction.

In determining whether testimony of a witness that has refused to answer questions on cross-examination should

be stricken, the Court should adopt the test set forth in *United States v. Cardillo*, 316 F.2d 606 (2nd Cir. 1963):

> In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified under direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and therefore, the witness' testimony may be used against him.

This standard has been generally followed in many circuits. See, *Carlos v. Wyrick*, 753 F.2d 691 (8th Cir. 1985); *United States v. Doddington*, 822 F.2d 818 (8th Cir. 1987). Clearly the purpose of the government's questioning was to impugn Massey's credibility, a fact they readily assert. (T. 138-139) Massey's credibility, or lack thereof, was evident throughout the numerous tape recordings played by the government when compared to his deposition. Any further attempt by the government to attack his credibility was merely cumulative. See, *United States v. Newman*, 490 F.2d 139 (1974) (Witness was such an unsavory character that any further evidence impugning his character was cumulative, thus cross-examination unnecessary.) Further, when this cumulative attack on Massey's credibility is weighed against Defendant Gary Haney's right to present exculpatory testimony and to call witnesses on his own behalf, the scales of justice tip far in favor of Gary Haney. Without an effective opening statement, potentially effective exculpatory evidence lost it's value.

Thus, the question in this case is whether Gary Haney should be denied access to exculpatory testimony because Massey would not give up his fifth amendment right of self-incrimination merely to allow the government to attack the witness' credibility on a collateral matter. In

Rock v. Arkansas, 483 U.S. 44 (1987), this Court was faced with a question of whether a witness could offer hypnotically refreshed testimony as exculpatory evidence. The government, of course, *inter alia*, argued the testimony should be excluded because the prosecutor would be incapable of conducting a full cross-examination on this type of testimony. The Court found that defendant's constitutionally protected right to testify and present exculpatory testimony was so crucial that it far outweighed the limitation on the government's right to cross examine.

In the present case, the testimony of Jerry Massey was critical to Gary Haney's over-all defense. The government's need to further attack Massey's credibility was minimal. The deposition should have been admitted and Gary Haney should have been allowed to discuss this testimony in opening statement.

B. Prejudice to Haney.

The deposition of Massey was read into evidence by the Defendant Gary Haney after the government withdrew it's objection at the close of its case. The objection should have been overruled in the first place. Since the deposition testimony should have been (and was) admitted, and Gary Haney was not permitted to summarize this evidence in opening statement, the question then becomes whether Gary Haney was actually harmed by his inability to use this information in opening statement. The questions is a resounding "Yes." A defendant is entitled to summarize evidence in his opening to assist the jury in understanding and evaluating evidence when it is to be presented.

There is a dearth of case law addressing this specific problem. The cases that address problems in opening statement are typically where the government improperly addresses issues in it's opening that should not have been raised. It has been stated that error during the opening statement is "more egregious" than at any other time because the opening is a planned and specific outline of the

party's case and the jury is greatly influenced by it. See *United States v. Johnson*, 767 F.2d 1259, 1274 (8th Cir. 1985). The court in *Johnson* stated "[*t*]*he statement poisoned the minds of the jurors at the commencement of the trial and was thus improper.*" (emphasis added) *See also, United States v. Masters*, 840 F.2d 587, 591 (8th Cir. 1988).

Gary Haney recognizes the trial court has discretion to regulate the manner of opening statement. See *United States v. Flute*, 807 F.2d 758 (8th Cir. 1986). This limitation should apply more to the form and not the substance and should not be abused to adversely affect a defendant's right to a fair trial.

All experienced trial practitioners know that many jurors irrevocably make up their minds as to the disposition of the case at the end of the opening statements.

> . . . fact is that juries often start to make up their minds on hearing opening statements. And thoughtful trial lawyers have known for a long time that when juries make up their minds, it is difficult to change them. . .
>
> It suggests to defense counsel in either civil or criminal cases that the opening statement usually should be made as soon as possible in the case instead of waiting until the plaintiff or prosecution rests, lest the case already be decided. *McElhaney's Trial Notebook*, Second Edition, p. 88

Other sources have recognized the significance of opening statement:

> Much has been written in recent years about the value of opening statement. The arguments for primacy have been legion and the psychologists have reported that as many as 80% of jurors irrevocably make up their minds and do not change on liability after opening statement. McKenzie, "Eloquence in Opening Statement, Vol. 10, Trial Diplomacy Jour-

> nal 32 (1987). *See* also, Riley, "The Opening Statement: Winning at the Outset," Vol. 3, American Journal of Trial Advocacy 225 (1979).
>
> Over two decades ago, in one of the initial studies, Professors Harry Kalven and Hans Zeisel of the University of Chicago Law School found that 85% of the time, the verdict the juror would have returned immediately after the opening statement was the same verdict which was returned at the end of the case. Levin, *Effective Opening Statements: The Attorney's Master Key To Courtroom Victory*, p. 104.

Obviously, fairness to the defendant during an opening statement is crucial. Here, not only did the government get to state to the jury in opening statement that Masssey *would* implicate Gary Haney and that the tapes would confirm Haney's involvement, Gary Haney *was not* permitted, on the other hand, to alert the jury to listen carefully to the tapes in proper context and that Massey would testify, under oath, that Gary Haney *did not know* of the drug transaction. By the time the jury heard the deposition, 7 days and numerous recordings of Massey later, it's impact had been watered down by the many days of prosecution witnesses. Thus, in opening, the government got to tell the jury that Massey would implicate Gary Haney, but Gary Haney was not allowed to tell the jury that Massey would swear Haney wasn't involved. The exculpatory deposition testimony was admissible and Gary Haney should have had the opportunity to discuss this evidence in his opening statement. Merely allowing this testimony to come into evidence later without the jury being told of it at the beginning of the case and being able to place it in perspective with the other testimony offered, unduly prejudiced defendant Gary Haney and denied him a fair trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BOBBY MCDANIEL
MCDANIEL & WELLS, P.A.
400 South Main Street
Jonesboro, Arkansas 72401
(501) 932-5950
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3048

UNITED STATES OF AMERICA,
Appellee,

v.

LEON FRAYER,
Appellant.

No. 92-3129

UNITED STATES OF AMERICA,
Appellee,

v.

GARY HANEY,
Appellant.

No. 92-3168

UNITED STATES OF AMERICA,
Appellee,

v.

AMBROSIO PEREZ-MURGUIA,
also known as HUETO,
Appellant.

No. 92-3262

UNITED STATES OF AMERICA,
Appellee,

v.

LARRY HANEY,
Appellant.

Appeals from the United States District Court
for the Eastern District of Arkansas

Submitted: June 14, 1993

Filed: November 29, 1993

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Leon Frayer, Gary Haney, Ambrosio Perez-Murguia, and Larry Haney appeal their convictions for conspiracy to distribute cocaine and marijuana. Leon Frayer also appeals his firearm conviction. We affirm the convictions of Frayer, Gary Haney, and Perez-Murguia. We reverse the conviction of Larry Haney.

I. BACKGROUND

The indictments in this case were the result of an investigation by agents of the United States Customs Service and the Drug Enforcement Agency (DEA). The

investigation began in early 1991, when an informant introduced Customs Service Agent John Turner to Jerry Massey (sometimes known as Herchel Massey), a drug-dealer living near Saltillo, Mexico. After that introduction, Agent Turner, using the alias of "John Anthony," had numerous telephone conversations with Massey, and Agent Turner recorded each one. In those taped conversations, Agent Turner and Massey extensively discuss drug transactions. Through his investigation, Agent Turner came to believe that Massey was the "kingpin" of a large drug operation. Although Massey was indicted in this case, he is incarcerated in Mexico and was not extradicted to stand trial in these proceedings.

In early summer 1991, Massey agreed to sell Agent Turner 150 pounds of marijuana at $750 a pound. Agent Turned planned to have another undercover agent on the Mexican border take delivery of the marijuana from an individual known to the agents as "Paco" and pay Paco $90,000. Agent Turner would then meet Massey's representative in Little Rock and pay that individual $22,500. Payment of the $22,500 was contingent on completion of the delivery. On July 2, 1991, Agent Turner met Larry Haney in the parking lot of AP's Seafood, in Jacksonville, Arkansas. Their conversation was electronically monitored. Larry Haney told Agent Turner that he and his brother, Gary, could "move every pound you can get." During the meeting, Larry called Gary from a pay phone, and handed the phone to Agent Turner. Agent Turner testified that Gary told him that something had gone wrong in Mexico and that the deal was off. Larry contends that he knew nothing about a drug deal. He testified that he thought his brother, Gary, was involved in a leather importing business and that Gary sent him to the restaurant to pick up some paperwork. Larry and Gary Haney were involved in the flea market business and there was evidence that merchandise is referred to in pounds in the flea market business.

After the marijuana deal fell through, Agent Turner and Massey negotiated for the sale of 100 kilograms of cocaine. One kilogram would be "fronted" and delivered to Agent Turner in Little Rock, Arkansas, and Agent Turner would pick up the remainder in Houston, Texas. On September 6, 1991, Massey told Agent Turner that a man named "Hueto" would deliver the kilogram of cocaine to Little Rock. A week later, Agent Turner and Agent Fehrenbach of the DEA met "Hueto," a/k/a Perez-Murguia, at the Otter Creek Holiday Inn in Little Rock. Perez-Murguia delivered one kilogram of cocaine and arrangements were made for the other 99 kilograms to be delivered in Houston, Texas, later in September 1991.

On September 13, 1991, Agent Turner contacted both Massey and Perez-Murguia to arrange to pay for the kilogram that had already been delivered and to arrange delivery of an additional 150 kilograms of cocaine. The agreed-upon price for the cocaine was $2,625,000 to be paid on delivery in Houston plus $500,000 to be paid to Massey. On September 17, 1991, Agents Turner and Fehrenbach met Perez-Murguia in Houston. The agents paid Perez-Murguia $16,500 for the kilogram that had been fronted to them, and flashed over $400,000 in cash to show that they could pay for the rest. The meeting was video-taped. Undercover agents did not take delivery of the cocaine because Perez-Murguia refused to deliver the cocaine to the hotel and Agent Turner was not willing, for security reasons, to go to a warehouse to pick up the cocaine.

In October and November 1991, Agent Turner continued negotiations with Massey for further drug transactions. In early December, Massey agreed to deliver 40 kilograms of cocaine to Agent Turner's representatives in Dallas for $21,500 per kilogram (a total sale price of $860,000). Of that price, $19,500 per kilogram was to be paid at the time of delivery in Dallas and $2,000 per kilogram ($80,000) was to be paid to people in Arkansas

working under Massey's direction: $20,000 to Frayer and $60,000 to Gary Haney. Agent Turner also convinced Massey to advance him $3,000 in travel expenses, feigning unhappiness about having travelled to Houston without completing a drug deal. Massey told Agent Turner that a man named "Leon" would meet him with the money.

On December 4, 1991, Leon Frayer met Agent Turner at AP Seafood in Jacksonville, Arkansas. Frayer gave Agent Turner $3,000 in one-hundred dollar bills for travel expenses. In conformity with the plans made earlier by Agent Turner and Massey, Agent Turner then took Frayer to a motel in North Little Rock and Frayer checked in. Frayer was directed to wait in the motel room until the deal in Dallas was completed. Agent Fehrenbach called Frayer three times at the motel. In one conversation, Frayer mentions delivering money to "Gary." Agent Fehrenbach later called Frayer to report that the transaction had been completed and to tell him that she would pick him up at the motel to pay him the money.

Frayer was arrested as he left the motel. Police officers searched him and found a loaded .22 caliber handgun and brass knuckles in his jacket pockets. He consented to a search of his motel room and the searching officers found notes in his room containing the names "John," "Hershel Massey," "Gary Haney," and "Ralph Cagle" (Cagle is Massey's associate). Frayer was later interviewed by police and admitted that he had wired money to Massey in early summar 1991 for a "wacky-tobacky" (marijuana) deal.

Meanwhile, on that same day, December 4, 1991, Agent Turner and Massey again made telephone contact to finalize the deal. Massey told Agent Turner to put $63,000 in an ice chest and to deliver it to Gary Haney (this amount included repayment of the travel advance). Gary Haney then called Agent Turner (using a phone number Agent Turner had given only to Massey) to ar-

range a meeting at the Waffle House in Little Rock. Both Gary Haney and Larry Haney met Agents Turner and Fehrenbach in the parking lot of the Waffle House. Their conversation was electronically monitored. The Haneys were later arrested in the parking lot. Meanwhile, DEA Agent Vic Routh and Perez-Murguia were executing the drug sale in Dallas. Perez-Murguia was arrested as he attempted to sell eight kilograms of cocaine to undercover Agent Routh.

After their arrests, each defendant was charged with a separate conspiracy to distribute cocaine and to distribute marijuana. Frayer was also charged with use of a firearm in connection with a drug offense.

Prior to trial, the defendants moved to depose Massey, who was incarcerated in Mexico. The district court allowed the deposition of Massey by telephone. In his deposition, Massey asserted the Fifth Amendment with regard to his own culpability. He also stated that he had told the Haney brothers that he was in the leather importing business and that they were not aware he was actually in the drug business.

At trial, the district court initially sustained the government's motion to strike Massey's deposition testimony. Defense counsel were instructed not to refer to the deposition in their opening statements. Midway through the trial, however, one of the defense counsel inadvertently referred to the deposition. After a conference outside the presence of the jury, the government withdrew its motion to strike and the district court admitted Massy's deposition testimony. The district court also offered the defendants an opportunity to supplement their opening statements, which the defendants declined.

The jury found Garey Haney guilty on both conspiracy counts. Frayer was found guilty on the marijuana conspiracy and the firearm counts. Perez-Murguia was found guilty of the cocaine conspiracy count. Larry Haney was found guilty on the marijuana conspiracy count.

Appellants assert numerous errors, only a few of which merit discussion. Perez-Murguia contends that his conviction puts him in double jeopardy because he had already been convicted for distribution—one of the overt acts in furtherance of the conspiracy—in federal district court in Texas. Leon Frayer contends: 1) that there is insufficient evidence to convict him on the marijuana count; 2) that the district court erred in refusing to allow discussion of the Massey deposition in opening statements; 3) that the district court erred in allowing hearsay from Massey's deposition to be introduced; 4) that he was prejudiced by remarks from a co-defendant's attorney; and 5) that the district court erred in allowing introduction of his confession in rebuttal. Gary Haney repeats Frayer's assertions concerning Massey's deposition. He also asserts that he was prejudiced by the district court's disrespectful remarks to counsel and by the erroneous admission of both hearsay and rebuttal evidence. Larry Haney contends that there is insufficient evidence to convict him, or, alternatively, that he should have been given a minimal participant reduction in sentencing.

II. DISCUSSION

A. Sufficiency of Evidence

Gary Haney, Larry Haney and Leon Frayer contend that the evidence is insufficient to convict them of conspiracy. In reviewing a jury verdict, we must examine the evidence in the light most favorable to the government and give the government the benefit of all reasonable inferences. *United States v. Sykes*, 977 F.2d 1242, 1246-47 (8th Cir. 1992). An appellate court can reverse only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.* This standard is a strict one and a jury verdict will not be overturned lightly. *Id.* To be guilty of a conspiracy, a defendant need only knowingly contribute his efforts in furtherance of the criminal ends of the conspiracy. *Id.*

With those standards in mind, we find sufficient evidence to support the convictions of Leon Frayer and Gary Haney, but insufficient evidence to support the conviction of Larry Haney.

There is evidence which links Gary Haney to both conspiracies. His name is mentioned on the tapes of recorded conversations between Massey and Agent Turner. The fact that he told Agent Turner in July 1991 that the marijuana deal had fallen through shows he communicated with Massey. There is also evidence of telephone contact between Massey and Gary Haney before the July meeting. His link to the cocaine conspiracy is demonstrated by Massey's instruction that Agent Turner deliver $63,000 in an ice chest to Gary Haney. Gary Haney arranged the meeting place and appeared there. Gary Haney also discussed the details of the cocaine delivery with Agent Turner. We therefore find sufficient evidence to convict Gary Haney on both counts.

Leon Frayer contends that there is no evidence that he entered the drug ring until August 1991 and therefore was not part of the marijuana scheme which ended in July 1991. Frayer stated to police officers after his arrest, however, that he had wired money to Massey in early summer 1991 for a "wacky-tobacky" scheme. Accordingly, there is evidence to support his conviction on the marijuana conspiracy count.

Frayer also asserts that there is insufficient evidence to convict him on the firearm count because he used the firearm in connection with the cocaine conspiracy count, of which he was acquitted. A conviction under 18 U.S.C. § 924(c) requires only that a defendant carry a firearm in connection with a drug crime; it is not necessary that he be convicted of the underlying drug offense. *United States v. Laing,* 889 F.2d 281, 288 (D.C. Cir. 1989), *cert. denied,* 494 U.S. 1069 (1990); *United States v. Hunter,* 887 F.2d 1001, 1003 (9th Cir. 1989), *cert. denied,* 493 U.S. 1090 (1990); *see also United States v.*

Watson, 953 F.2d 406, 409 n.5 (8th Cir. 1992) (affirming a conviction under 924(c) even though defendant had been acquitted of predicate offense). We find the evidence sufficient to support Frayer's conviction on the firearm count.

Larry Haney's conviction is another matter. He is not specifically mentioned on any of the incriminating tapes. The only evidence tying Larry Haney to the marijuana conspiracy is his presence at the meeting place in July 1991. There is no evidence that he knew that he was there to be part of a drug deal. His statement that we "could move every pound you can get," without other corroborating evidence, simply does not prove beyond a reasonable doubt that he was aware of the conspiracy. He contends that this comment referred to the leather importing business and there is some evidence to support that explanation. There may be evidence to support his involvement with the later cocaine deal, but his involvement with that scheme does not prove beyond a reasonable doubt that he was part of the earlier marijuana scheme. Accordingly, viewing the evidence in the light most favorable to the government, we find the evidence insufficient to convict Larry Haney on the marijuana count.[1]

B. Double Jeopardy

Perez-Murguia contends that he was twice prosecuted for the same conduct in violation of the Double Jeopardy Clause of the Fifth and Fourteenth Amendments of the Constitution.

The double jeopardy bar applies only to prosecutions or convictions which cannot survive the "same elements"

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[1] In light of our finding, we need not address Larry Haney's contention that he should have been given a minimal participant reduction in sentencing. Neither need we reach his evidentiary arguments.

test. *United States v. Dixon,* 113 S. Ct. 2849, 2859 (1993). The same elements test inquires whether each offense contains an element not contained in the other; if so, they are not the same offense and the Double Jeopardy Clause does not bar additional punishment and subsequent prosecution. *Id.* Perez-Murguia was convicted in Texas for possession of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). The conviction at issue here is for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846.[2] Each of the offenses involve different elements.[3] Thus the Double Jeopardy Clause does not prevent a conspiracy prosecution after a prosecution for possession with intent to distribute. *Blockburger v. United States,* 284 U.S. 299, 304 (1932); *United States v. Dixon,* 113 S. Ct. at 2859-60 (1993) (once court decides offenses involve different elements, double jeopardy inquiry ends). Accordingly, we find that Perez-Murguia's conviction does not violate the Double Jeopardy Clause.

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[2] The Supreme Court has abandoned the "same conduct test" of *Grady v. Corbin,* 495 U.S. 508 (1990). *See United States v. Dixon,* 113 S. Ct. 2849, 2860 (1993). Thus we need not reach the issue of whether the same conduct was involved. We note, however, that the possession with intent to distribute charge to which Perez-Murguia entered a plea of guilty in federal district court in Texas arose out of Perez-Murguia's delivery of eight kilograms of cocaine to undercover Agent Routh in Dallas. The present prosecution and conviction involves the earlier conspiracy to deliver a kilogram of cocaine to undercover Agents Turner and Fehrenbach in Little Rock, Arkansas.

[3] To sustain a conviction for possession with intent to distribute, the government must prove a reasonable doubt that the defendant knowingly possessed and intended to distribute an illegal drug. *United States v. Cortez,* 935 F.2d 135, 143 (8th Cir. 1991). To convict a defendant of conspiracy to distribute under 21 U.S.C. § 846, the government must prove an agreement between two or more people, including the defendant, for the purpose of engaging in distribution of drugs. *United States v. Aranda,* 960 F.2d 211, 214 n.3 (8th Cir. 1992).

C. Massey's Deposition

Leon Frayer and Gary Haney assert that their defense was crippled by their inability to refer to Massey's deposition in opening statements. Their defense was that Massey deceived them into believing they were involved in a legitimate leather importing business. They assert prejudice because the government was allowed to put on its case, including playing the incriminating tapes, before they were allowed to make the jury aware of the deposition testimony which ostensibly exonerates them.

The district court has broad discretion in determining the admissibility of evidence, and its rulings will be overturned only if they constitute abuses of that discretion. *United States v. Willis*, 997 F.2d 407, 414 (8th Cir. 1993). In a conspiracy trial, the district court's discretion in evidence questions is particularly broad. *Id.* In any event, we will not disturb the evidentiary rulings of the district court absent a showing of prejudice. *Hicks v. Six Flags Over Mid-America*, 821 F.2d 1311, 1316 (8th Cir. 1987).

Although we are inclined to believe that the district court's initial ruling that the deposition testimony was inadmissible was correct, we need not reach that issue because the defendants have not shown prejudice in light of the eventual receipt of the evidence. The jury was given the opportunity to consider the defense of "being duped," bolstered as it was by Massey's testimony, and the jury apparently did not believe it. In light of the other evidence of the conspiracy, we find that the delayed receipt into evidence of Massey's deposition did not prejudice the defendants. We have considered Haney's and Frayer's other contentions with respect to Massey's deposition and find them lacking in merit.

D. Trial Judge's Actions

After Gary Haney had rested his case, and during the cross-examination of co-defendant Larry Haney, counsel

for Gary Haney attempted to interpose an objection. The district court instructed counsel for Gary Haney not to register further objections, but to consult with counsel for Larry Haney.[4] He asserts this admonishment in the presence of the jury destroyed his counsel's credibility in the eyes of the jury and denied him effective and zealous representation of counsel.

Later, out of the presence of the jury, the district court clarified its ruling:

> THE COURT: . . . Relative to Mr. McDaniel's participation, the Court still adheres to the order that if you want to object during the inquiry pertaining to Mr. Larry Haney, you consult with Mr. Clark. If there's anything that relates to Mr. Gary Haney, you stand up and you identify the fact that you are registering an objection in behalf of Mr. Gary Haney. We're not preventing you from objecting

---

[4] The colloquy went like this:

> THE COURT: Let's not double team on the government here now. You might consult with Mr. Clark, but we're not going to have two defense counsel registering objections. You may go over there and consult with Mr. Clark, but we're not going to have you objecting simultaneously along with Mr. Clark.
>
> MR. MCDANIEL: If it please the court, and I respectfully state to the Court, in my representation of Gary Haney, who is tried jointly with Larry Haney—
>
> THE COURT: Yes.
>
> MR. MCDANIEL: —and the evidence with Larry Haney is being presented to this same jury, I respectfully submit it's my duty if I think the government is doing something inappropriate with any witness, Larry Haney, Leon Frayer or anybody else. I respectfully submit to the Court—
>
> THE COURT: You have rested.
>
> MR. MCDANIEL: But that doesn't mean I don't have a right to object, Your Honor.
>
> THE COURT: I'm directing you whenever you have an objection to consult with Mr. Clark. Understood?
>
> Transcript at 1610-11.

> and we're not preventing you from representing Gary Haney, but when it comes down to Larry, we will not permit you to double team the government. He's got competent counsel and he would have not been appointed if the Court felt he was not competent in representing him.
>
> You may go over there and consult with Mr. Clark, but we're not going to have you objecting simultaneously along with Mr. Clark.

Transcript at 1632-33. The district court later stated, "the Court in no way seeks to restrict you in representing Gary Haney." Transcript at 1634.

Traditionally, we accord the trial judge "broad discretion in the conduct of [a] trial". *Dobson v. Bacon Transp. Co.*, 607 F.2d 805, 807 (8th Cir. 1979). Accordingly, "trial courts have discretion to place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence." *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987). We therefore typically review the conduct of a trial only for abuse of discretion. *First Nat'l Bank and Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1304 (8th Cir. 1991).

We note that the district court did not deny counsel an opportunity to object on behalf of his client. The restriction went merely to counsel for Gary Haney objecting on behalf of Larry Haney. Even that restriction was not absolute; counsel was instructed only to confer with Larry Haney's counsel so that only one attorney would object. While the admonishment might more properly have been delivered outside the presence of the jury, we find that the district court's conduct does not amount to an abuse of discretion. In addition, Gary Haney has not shown prejudice as a result of the admonishment. He has not pointed us to any piece of evidence or testimony which, if objected to, could have made a difference in the outcome of this trial. We have reviewed the trans-

cript and find, in the context of the entire trial, no abuse of discretion.

III. CONCLUSION

For the reasons stated above, the convictions of Leon Frayer, Ambrosio Perez-Murguia and Gary Haney are affirmed; the conviction of Larry Haney is reversed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3129EALR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GARY HANEY,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Arkansas

The petition for rehearing by the panel is denied.

January 6, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus
Clerk
U.S. Court of Appeals
Eighth Circuit

(2)

Supreme Court, U.S.
FILED
AUG 8 1994
OFFICE OF THE CLERK

No. 93-1976

In the Supreme Court of the United States

OCTOBER TERM, 1994

GARY HANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

11 pp

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial because his attorney was precluded from discussing, in his opening statement, evidence previously ruled inadmissible, when that evidence was later admitted and counsel was afforded the opportunity to supplement his opening statement.

2. Whether petitioner was denied a fair trial by the manner in which the district court limited petitioner's attorney's ability to raise objections on behalf of petitioner's co-defendant, without restricting his ability to raise objections on behalf of petitioner.

3. Whether the district court erred in admitting testimony about a co-defendant's prior marijuana dealings, to rebut the co-defendant's defense that he had never had anything to do with marijuana.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals' opinion (Pet. App. 1a-14a) is reported at 9 F.3d 1367.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1993. A petition for rehearing was denied on January 6, 1994. Pet. App. 15a. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 3, 1994, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted on separate counts of conspiracy to distribute cocaine and conspiracy to distribute marijuana (21 U.S.C. 846). He was sentenced to concurrent terms of 163 months' imprisonment on each count. The court of appeals affirmed. Pet. App. 1a-14a; Gov't C.A. Br. 1, 13.

1. Petitioner participated in a drug importation and distribution conspiracy that was headed by Jerry Massey. John Turner, an undercover Customs Service Agent, penetrated the conspiracy. In taped telephone discussions between Massey and Turner involving drug deals, Massey mentioned petitioner as an accomplice. Pet. App. 8a. The evidence also showed a series of telephone communications between petitioner and Massey. *Ibid.* On July 2, 1991, Turner met with petitioner's brother, Larry Haney, to discuss marijuana distribution. During that meeting, Turner spoke with petitioner by telephone, and petitioner told Turner that an anticipated deal had fallen through. *Id.* at 3a. In connection with a December 1991 agreement for Massey to supply Turner with 40 kilograms of cocaine, Massey instructed Turner to deliver $63,000 to petitioner in an ice chest, and petitioner arranged the meeting place. *Id.* at 5a-6a. When petitioner appeared at the meeting place, he was arrested. *Id.* at 6a.

2. a. Massey was indicted with petitioner and other co-defendants, but he was incarcerated in Mexico and was not extradited to stand trial with the others. Prior to the joint trial of petitioner, petitioner's brother Larry, and two other co-defendants, the defendants were permitted to depose Massey by telephone. On direct examination during the deposition, Massey testified that

he had told petitioner and his brother that he was in the leather importing business. Massey also testified that they were not aware that he was in the drug business. Pet. App. 6a. On cross-examination, Massey asserted the Fifth Amendment privilege in response to the government's questions about the extent of the conspiracy and the contradictions between Massey's prior statements and his attempted exculpation of petitioner and petitioner's brother. See Gov't C.A. Br. 2-3.

The district court granted the government's motion *in limine* to preclude introduction of Massey's deposition testimony, and the court instructed defense counsel not to refer to it in opening statements. During trial, however, one defense attorney inadvertently referred to the deposition. After a bench conference, the government withdrew its objection to the deposition, which was then admitted. The district court then offered the defendants an opportunity to supplement their opening statements, but they declined to do so. Pet. App. 6a.

b. After petitioner rested his case, and during the government's cross-examination of petitioner's brother, counsel for petitioner attempted to interpose an objection to the questioning. The district court instructed petitioner's counsel not to register further objections to the cross-examination independently, but to consult with the brother's counsel. See Pet. App. 11a-12a. Later, out of the presence of the jury, the court clarified its ruling to explain that it had no intention of preventing petitioner's counsel from objecting on behalf of petitioner, but that counsel could not independently interpose an objection on behalf of petitioner's brother, except in coordination with the brother's counsel. *Id.* at 12a-13a.

c. When petitioner's brother testified in his own defense, he claimed that he had never been involved in

any marijuana or cocaine conspiracies. See Gov't C.A. Br. 31. On cross-examination by the government, he stated that he had never smoked marijuana with a Bradford Powell or sold marijuana to Powell. *Ibid.* The government later called Powell as a rebuttal witness to testify that Larry Haney had sold him marijuana, and that Powell had seen Larry Haney possess and use marijuana. *Ibid.*

3. The court of appeals affirmed petitioner's convictions.* It first rejected petitioner's claim that his defense was "crippled" by his inability to refer to Massey's deposition in his opening statement (Pet. App. 11a):

> Although we are inclined to believe that the district court's initial ruling that the deposition testimony was inadmissible was correct, we need not reach that issue because [petitioner has] not shown prejudice in light of the eventual receipt of the evidence. The jury was given the opportunity to consider the defense of "being duped," bolstered as it was by Massey's testimony, and the jury apparently did not believe it.

The court also rejected petitioner's argument that he was prejudiced by the district court's restriction on his counsel's ability to object to the government's cross-examination of his brother. Pet. App. 13a. Observing that the trial court has "broad discretion in the conduct of [a] trial" (*ibid.*), the court noted that the district court did not deny petitioner's counsel an opportunity to object

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* The court of appeals also affirmed the convictions of co-defendants Leon Frayer and Ambrosio Perez-Murguia, but reversed the conviction of Larry Haney for insufficient evidence. See Pet. App. 2a, 9a.

on behalf of his own client, but merely restricted counsel from objecting on behalf of Larry Haney. Moreover, even that restriction was not absolute; the court simply instructed counsel to confer with Larry Haney's counsel so that only one attorney would object on Larry Haney's behalf. *Ibid.* While the court acknowledged that the admonishment might more properly have been delivered outside the presence of the jury, it concluded that the district court's conduct did not amount to an abuse of discretion. *Ibid.*

The court did not directly address petitioner's argument that he "was prejudiced by the district court's * * * erroneous admission of * * * rebuttal evidence," Pet. App. 7a; see Pet C.A. Br. 46-49. The court appears, however, to have rejected the argument *sub silentio* in upholding the sufficiency of the admissible evidence to support petitioner's convictions. See Pet. App. 8a.

ARGUMENT

1. Petitioner argues (Pet. 17-24) that he was deprived of a fair trial when the district court ruled before trial that Massey's deposition would be inadmissible and therefore precluded petitioner's counsel from referring to the deposition in his opening statement. As the court of appeals pointed out, the lack of prejudice to petitioner makes it unnecessary to consider whether the district court's pretrial exclusion of the deposition was correct. Pet. App. 11a. Petitioner's ability to present his defense of being duped by Massey was not significantly impaired because the deposition was eventually admitted at trial, and petitioner's counsel was given the opportunity to supplement his opening statement, which he declined. The court of appeals' conclusion that petitioner was not prejudiced is fact-specific and does not warrant further review.

2. Petitioner also argues (Pet. 11-17) that he was denied a fair trial by the manner in which the district court restricted his counsel's ability to raise objections during the government's cross-examination of his brother. Petitioner characterizes the restriction (Pet. 12) as an order for counsel "to register no more objections at trial." As the court of appeals observed (Pet. App. 13a), however, the district court explained to counsel almost immediately after its ruling that the restriction was not so broad. Under the district court's ruling, petitioner's counsel was permitted freely to object on behalf of petitioner; he was restricted only to the extent that he could not object on behalf of petitioner's brother, without first consulting the brother's counsel. See *id.* at 12a-13a. That ruling was a proper exercise of discretion to limit petitioner's brother to one advocate at a time, and petitioner has not identified any matter received into evidence while counsel was under the admonition not to object that could have made a difference in the outcome of the trial. Moreover, while it might have been preferable for the court to instruct petitioner's counsel at the bench, petitioner has not suggested how the jury might have been unfairly prejudiced against him by the trial judge's directive to his attorney.

3. Petitioner maintains (Pet. 8-10) that there is a split in the circuits regarding the admissibility of evidence of prior bad acts to rebut a defendant's denial of involvement in the charged criminal offense. That issue, however, has nothing to do with this case, for two reasons. First, the evidence in question did not relate to petitioner at all, but rather concerned prior drug activity by petitioner's brother. Second, the rebuttal evidence at issue here—Bradford Powell's testimony that petitioner's brother Larry had prior dealings with

marijuana—was admitted to impeach Larry's claim that he had never had any involvement in any marijuana conspiracy, and that he had never sold or used marijuana. See Gov't C.A. Br. 31. The rebuttal evidence was properly admitted to show that Larry was not a credible witness, and not for the purpose of showing that Larry was likely to have participated in the alleged marijuana conspiracy because he had had dealings with marijuana on prior occasions.

Unlike the cases on which petitioner relies (Pet. 8-10), this case does not involve the admissibility of prior bad acts as substantive evidence under Rule 404(b) of the Federal Rules of Evidence, but rather the impeachment of a false statement by a defendant through contradiction. "The federal courts, at least in the case of a defendant-witness, have allowed contradiction by extrinsic facts even on collateral issues if the defendant falsely stated a fact on direct." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 607[05], at 607-84 to 607-85 (1994) (footnote omitted). Even when the false statement is made on cross-examination, extrinsic evidence may be admissible to impeach the witness if the probative value of the evidence outweighs the danger of unfair prejudice. See *id.* at 607-87. "Once a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case." *United States* v. *Benedetto*, 571 F.2d 1246, 1250 (2d Cir. 1978); see also *United States* v. *Bell*, 506 F.2d 207, 212-214 (D.C. Cir. 1974). Cf. *Walder* v. *United States*, 347 U.S. 62, 65 (1954) (impeaching evidence obtained in violation of Fourth Amendment admissible when, "[o]f his own accord, the defendant went beyond a mere denial of complicity in the

crimes of which he was charged and made the sweeping claim [on direct and cross-examination] that he had never dealt in or possessed any narcotics"). The evidence in question was therefore properly admitted to impeach petitioner's brother.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

AUGUST 1994